Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No._____

No. 77-1187

ROBERT EUGENE BLACK
and
ALTERNATE SYSTEMS, INC.
Petitioners,
vs
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Robert Eugene Black and Alternate Systems Inc. request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, Denver, Colorado, (No. 76-1780 and No. 76-1781), entered January 19, 1978, affiming petitioners' convictions in the United States Ditsrict Court for the District of Kansas, at Kansas City, Kansas. 318 F. Supp. 378 (D. Kan. 1976)

OPINIONS BELOW

A copy of the Opinion of the United States District Court for the District of Kansas, 418 F. Supp. 378 (D. Kan. 1976), and the Opinion of the United States Court of Appeals for the Tenth Circuit, No. 76-1780 and No. 76-1781 are attached hereto as Appendix I and II.

JURISDICTION

On January 29, 1978, the United States Court of Appeals for the Tenth Circuit in No. 76-1780 and No. 76-1781 affirmed the conviction of petitioners in the United States District Court for the District of Kansas.

Petitioners submit that Title 28 *U.S.C.* §1254(1) confers jurisdiction on this Court, which reads in part:

> "(1) By writ of certiorari granted to any party to any civil or criminal case, before or after rendition of judgment or decree: . . ."

Jurisdiction is further based on Supreme Court Rule 19(1)(b):

> "Where a Court of Appeals has . . . decided an important question of federal law which has not been, but should be settled by this court; . . ."

QUESTION PRESENTED FOR REVIEW

WHETHER THE CREATION OF A POSTAL MONOPOLY BY ENACTMENT OF THE "PRIVATE EXPRESS STATUTES" AS EMBODIED IN 39 U.S.C. §601-604 AND THE CRIMINAL COUNTERPART THEREOF, 18 U.S.C. §1696 EXCEEDS THE POWERS GRANTED TO CONGRESS BY ARTICLE I SECTION 8 OF THE CONSTITUTION AND DENIES CERTAIN RIGHTS RESERVED TO THE STATES AND THE PEOPLE BY THE TENTH AMENDMENT THERETO.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8:

> "The Congress shall have the power . . . To establish Post Offices and Post Roads: . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, . . ."

UNITED STATES CONSTITUTION, AMENDMENT 10:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

18 *U.S.C.* 1696

> "Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place, between which the mail is regularly carried, shall be fined not more than $500.00 or imprisoned not more than six months, or both.

STATEMENT OF FACTS

On May 4, 1976, an information was filed charging petitioners Roberts Eugene Black and Alternate Systems, Inc. with one count of establishing a private express for the conveyance of letters in violation of 18 *U.S.C.* §1696.

On June 4, 1976, petitioners filed a Motion to Dismiss based on the unconstitutionality of 18 *U.S.C.* §1696, which the trial judge treated as a Motion for Judgment of Acquittal at the conclusion of all evidence. By agreement of all parties the case was submitted to the Court for trial and disposition on a written stipulation of facts wherein petitioners in effect admitted they were in violation of 18 *U.S.C.* §1696.

One June 28, 1976, the District Court, by memorandum and order denied petitioners' Motion for Judgment of Acquittal and found both petitioners guilty as charged. Robert Eugene Black was fined $500.00 plus court costs; Alternate Systems, Inc. was fined $500.00, execution of which was suspended on the condition that said petitioner cease to operate in violation of 18 U.S.C. §1696. Notice of Appeal to the United States Court of Appeals for the Tenth Circuit was timely filed.

On January 19, 1977, the Tenth Circuit affirmed the judgment of the District Sourt.

REASONS FOR GRANTING WRIT OF CERTIORARI

Petitioners urge three special and important reasons why this Court in the exercise of sound judicial discretion, should issue a Writ of Certiorari:

1. This Court has never squarely faced the question of whether the Constitution gives Congress the power to create a postal monopoly.

The 100-year-old case most often cited for that proposition in fact dealt with the problem of whether a lottery could be sent through the mail. *Ex Parte Jackson*, 96 U.S. 727 (1877). The closest the *Jackson* court came to deciding the instant issue was to say, "To give efficiency to its regulations and prevent rival postal systems, it *may perhaps* prohibit the carriage by others for hire. . . ." Id. pg. 735 (Emphasis added).

What the Court in fact ruled in *Jackson* was that a law prohibiting articles containing undesirable subject matter from the mail was within the powers granted to Congress and therefor constitutional. But Mr. Justice Field even qualified that by saying:

> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe, regulations as to what shall constitute mail matter but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." Id. 732.
>
> ". . . No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." Id. 733.

Therefore it is apparent that this Court not only did not rule on the constitutionality of the monopoly, but did rule emphatically that any laws passed by Congress in support of the postal system must be subordinate to those rights reserved to the people.

Thus it would appear that the power to create post offices and post road, such being neither prohibited to the states by Article 1, Section 10 of the Constitution nor exclusively granted to Congress, must be among those powers reserved to the States or to the people under the 10th Amendment, and therefore among those "rights reserved to the people, of far greater importance than the transportation of the mail."

2. All cases cited to support the constitutionality of the posal monopoly, support their finding by saying that to allow competition would "skim the cream" of income from the mails and leave the government with only the difficult and expensive deliveries. *Blackman v. Gresham*, 16 F. 609 (2d. Cir. 1883). Some additionally allude to the fact that governments have always exercised a monopoly. *William v. Wells Fargo and Co. Express*, 177 F. 352 (8th Cir. 1910).

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Petitioners urge that such reasoning is archaic and should not be pursuasive in the light of present-day social and economic conditions. Potential loss of the "cream" of revenue is not justification to deprive the people of rights reserved to them under the 10th amendment, when in fact the postal service is a public service, subsidized by huge annual injections of tax dollars.

The Courts which cite historical precedent as justification for the monoly lose sight of the historical reasons for postal monopolies. The postal monopoly in England was originally designed for political purposes, the reigning monarchs fearing that private carriers would be used to carry out treasonable plots. When the public began using the postal system and the monopoly became profitable, monarchs farmed out the postal patent and the attendant revenues to favorite subjects as boons. The practice obviously originated, not from any logically reasoned benefit to the people, but simply because the King was sovereign. Our federal government has no prerogatives of sovereignty except those that are granted to it by our Constitution, and therefore should lay no claim to powers assumed by monarchial or despotic rulers.

3. The "Private Express Statutes" do not constitute a settled and unquestioned body of law.

On February 22, 1978, the United States Court of Appeals for the Second Circuit will hear a constitutional challenge to the postal monopoly. *United States Postal Service v. Patricia H. Brennan and J. Paul Brennan, d/b/a P. H. Brennan Hand Delivery.* (2d. Cir. No. 78-6002 Civil).

On November 29, 1977, the United States District Court for the District of Columbia issued a memorandum opinion overruling an argument as to whether portions of the Private Express Statutes were violative of

the constitutional rights to due process, free speech and equal protection of the laws. *Associated Third Class Mail Users v. United States Postal Service, et al,* (D.C.D.C. No. 76-1768 Civil).

This recent influx of cases upon the federal court system is indicative of growing dissasifaction with the postal system and a propensity among the populace to challenge that system and the constitutional authority under which it operates.

Petitioners obviously cannot predict the outcome of the pending cases, nor whether the unsuccessful parties therein will eventually petition this Court for Writs of Certiorari, but the fact that at least three cases involving such closely related questions were brought to the federal courts in such a short span of time indicates a need for Supreme Court determination.

CONCLUSION

Petitioners ask that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in case No. 76-1780 and No. 76-1781, entered January 19, 1978, because said matter presents to the Court:

1. A question of constitutional interpretation which has not been fairly urged nor squarely met by this Court.

2. A question which, when decided by lower courts as a peripheral issue, was resolved by archiac and illogical reasoning not in tune with the current social and economic situation.

3. A question which is currently of extremely high social significance as evidenced by governmental and private sector dissatisfaction with the Postal Service and the recent influx of cases filed in the federal court

system challenging the constitutionality of the Private Express Statutes.

Respectfully Submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,
v. No. 76-48-CR2
ROBERT BLACK and
ALTERNATE SYSTEMS, INC.,
Defendants.

MEMORANDUM AND ORDER

This is a criminal action wherein the defendants ROBERT EUGENE BLACK, individually and in his official capacity as President of Alternate Systems, Inc., and ALTERNATE SYSTEMS, INC., are charged by information with the establishment of a private express for the conveyance of letters in violation of 18 U.S.C. §1696.

Defendants filed a motion to dismiss the information. At the hearing on said motion, all parties and counsel agreed to submit the case to the court for trial and disposition on a written stipulation of facts . At the same time the court would consider and rule on the defendants' motion to dismiss.

The written stipulation has now been filed and the facts therein contained shall constitute the court's findings of fact as to both defendants. [See Rule 23 (c), Federal Rules of Criminal Procedure]. The defendants' motion to dismiss is deemed more properly a motion for judgment of acquittal at the conclusion of all the evidence. [Rule 29 (a), *supra*].

Highly summarized, the stipulation discloses that Alternate Systems, Inc. was incorporated under the

laws of Kansas on February 12, 1976, and has been engaged in business in Pittsburg and Fontenac, Crawford County, Kansas, since March 9, 1976. From on or about March 1, 1976, Robert Eugene Black, on behalf of Alternate Systems, Inc., actively solicited business establishments in the City of Pittsburg, seeking delivery of items over post routes in the cities of Pittsburg and Frontenac. These two cities have established post routes between and over which mail is regularly carried. These routes have been in existence and have been utilized by the United States Postal Service during all times pertinent to this action. From on and after March 9, 1976, the defendants established delivery routes in the cities of Pittsburg and Frontenac, which routes concided with the above post routes.

The stipulation further establishes that in response to a business solicitation from the defendant Black, a doctor in Pittsburg utilized the services of Alternate Systems, Inc. in sending statements for medical services to his patients. One of the statements was in a letter addressed to the patient in Pittsburg, and the letter was delivered by defendants to the named addressee. It is stipulated the defendants delivered the letter knowingly and wilfully, but they did so in the good faith belief that the criminal statute 18 U.S.C. §1696, under which defendants are charged, is unconstitutional.

In support of their attack on the constitutionality of the statute, defendants first claim the creation of a postal monopoly exceeds the power granted to Congress by the Constitution and restricts certain rights therein reserved to the people, namely, the right of free enterprise. Defense counsel concedes there is considerable case law which may and is frequently cited for the proposition that the postal monopoly created by Congress

is constitutional. Nevertheless, the argument is advanced that the courts have never squarely faced a monopoly challenge.

Article One, Section Eight of the Constitution of the United States vests power in Congress to establish post offices and post roads. The United States Supreme Court has recognized this power as embracing the regulation of the entire postal system of the country. In *Ex Parte Jackson*, 96 U.S. 727 (1977) the court said:

> "The power vested in Congress 'to establish post-offices and post roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned . . . . The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." (at 732).
>
> ". . . To give efficiency to its [Congress'] regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but

further than this its power of prohibition cannot extend." (at 735).

The exclusive power of Congress to regulate the postal system has deep historical roots. In 1656 the Post Office Department of England was first established, and to some degree ever since has monopolized the business of carrying the mail of its citizens. Even prior to the old Confederacy, the American colonies exercised as a governmental right, the establishment of post offices and post roads. Under the old Articles of Confederation, the Continental Congress was invested with the sole and exclusive power of establishing and regulating post offices throughout the United States. When our present Constitution was adopted this power was extended, and the power to establish post roads, as well as post offices, was given.

After carefully reviewing the history and development of the postal system, the court in *Hoover v. MEChesney*, 81 Fed. 472 (C.C.D.Ken. 1897), described the monopolistic character of the system in the following language:

> "It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a governmental function: that the money which pays for this perfect postal system is raised by the postage charged, and all deficits paid out of the common treasury of the United States: that it is a monopoly which excludes not only the states, but all individuals, . . ." (at 480).

The right of Congress to protect its monoply with respect to the conveyance of "letters or packets" is well grounded in judicial precedent. Predecessor statutes of which is now 18 U.S.C. §1696 were considered in the

frequently cited cases of *Blackham v. Gresham*, 16 Fed. 609 (C.C.S.D.N.Y. 1883), and *Williams v. Wells Fargo & Co. Express*, 177 Fed. 352 (8th Cir. 1910). Each of these cases involved a factual situation similar to that found in the instant case. These decisions leave no doubt that a true governmental monopoly was intended by Congress as to the carriage and delivery of "letters or packets," and the statutes involved effectively prohibited private persons from engaging in such activity. In *Wells Fargo*, the court said:

> "While at one time questioned, there remains no doubt but that, under the constitutional authority granted, Congress may, as it has done, reserve to the postal department of the government a monopoly of the business of receiving, transmitting, and delivering the mails of the country, and in the exercise of such right of monopoly Congress may enact such rules, regulations, and laws as will effectively preserve such right of monopoly intact, and as will deter all others, including private right of monopoly intact, and as will deter all others, including private individuals and express companies, from engaging therein, and to this end Congress may prescribe such fines, penalties, forfeitures, and punishments as it may deem proper to preserve this right of monopoly retained by the government. For this purpose section 3982 above quoted was enacted." (at 356).

> ". . . Such laws enacted for the purpose of preserving the right of monolopy in the Post Office Department of the government, and preventing private express and other companies and individuals from engaging therein, have many times received the consideration of the courts of this

country, as will be seen from a reading of a few of the many cases. (citing cases)." (at 357).

"While from the foregoing cases it will be seen many questions arose touching the right of the government to be protected in its monopoly in the business of receiving, transporting, and delivering the mail matter of the country, consisting of letters or packets of letters, and touching the construction of penal laws designed to prohibit all others than the Post Office Department of the government from engaging in the business of carrying letters or packets for hire over post roads, yet in none has it been decided or even contended the word "packet" employed in the statute was designed or intended by Congress to be construed as granting the Post Office Department a monopoly of the right to receive, transport, and deliver parcels or packages of merchandise. On the contrary, the entire history of the legislation on this subject from the beginning, and the many adjudicated cases as well, show the legislative intent to have been to maintain for the government a monopoly only of the carriage of its mails, consisting of letters and packets of letters, and the like mailable matter." (at 358).

Of more recent vintage, we find a case arising in our own circuit, *National Ass'n of Letter Car. v. Independent Postal Sys.*, 470 F. 2d 265 (10th Cir. 1972), affirming 336 F.Supp. 804 (W.D.Okla. 1971). This was an injunction action directed against the defendants who proposed to sell their own postage stamps, and themselves deliver individually addressed Christmas cards in envelopes bearing those stamps. In upholding

the granting of injunctive relief by the lower court, the circuit court specifically recognized that the private express statutes (39 U.S.C. §601, and its criminal counterpart 18 U.S.C. §1969) are designed to give effect to the constitutional mandate that Congress establish "Post Offices and post roads" and the plain intent of the statutes is that the United States shall have a monopoly in the delivery of letters. The court further observed that the defendants, by their proposed operations, would break this monopoly and siphon off what was described as the "cream" of the postal operation; that is, the delivery of certain letters in various metropolitan areas without payment of United States postage.

The concern of the courts for the maintenance of the governmental monopoly, in order to safeguard the financial integrity of the system, was also expressed in *Blackham v. Gresham, supra*, where a "free enterprise" argument similar to that urged here was rejected:

> ". . . If private agencies can be established, the income of the government may be so reduced that economy might demand a discontinuance of the system: and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service." (at 612).

The defendants in the instant case have cited no authority in support of their monopoly challenge. Instead, they only seek to distinguish the cases herein discussed, and beg the question by asserting the courts

have "consistently acquiesced in the constitutionality of the postal monopoly," rather than come to grips with the issue. We do not believe the historical circumstances attending the framing and adoption of the Constitution can be so lightly ignored.

History convinces us that the framers of our Constitution were concerned that Congress be given broad powers to develop a postal system that would meet the needs of all the people in the entire country. The specific grant of power also carried with it the power to enact all laws which may be necessary and proper to carry into effect the power expressly granted. (Article 1 §8). The establishment of post offices and post roads was a matter of great national interest and importance. The experience of England and that of our forefathers, down through the time of the Revolution, should have left little or no doubt that the business of carrying mail could best be accomplished by placing sole and exclusive power in Congress. Contrary to defendants' arguments, the constitutional grant of power carried with it no express or implied limitation. In the exercise of its legislative wisdom, Congress saw fit to create a postal monopoly with respect to certain types of mail—specifically, letters, such as are involved here. In fact, the Second Congress, in 1792, enacted the first postal statute prohibiting private persons from carrying letters for hire. This action was entirely consistent with the experience of early day governments in England and America. In each and every case reaching the courts since that time, the right of Congress to create and maintain a postal monopoly has met with judicial approbation.

Faced with such precedent, both legislative and judicial, we can only conclude that defendants have

failed to sustain the heavy burden of establishing the unconstitutionality of 18 U.S.C. §1696 which, as a penal statute, carries with it presumptive validity.

Defendants make an additional argument to the effect that if Congress can prohibit transportation of a letter by any means other than the postal service, then "it is highly conceivable" that the price of postage can be increased to the point that "many poor people" and "small businesses that depend on the mails" will be severely restricted in their ability to communicate by letter. Obviously, defendants seek to mount a First Amendment challenge premised on the guarantee that Congress shall make no law abridging the freedom of speech.

This argument is so speculative and filled with conjecture as to deserve little or no comment. Defendants make no claim the private express statutes as now administered violate their own First Amendment rights. The most they can say is that the statutes *might* affect, in the *future*, First Amendment rights of *other* persons or groups of persons. There has been no showing that application of 18 U.S.C. §1696 has resulted in an abridgement of defendants' freedom of speech. The court is of the opinion that defendants simply are in no position to have their First Amendment challenge considered. One may not be heard to challenge the constitutionality of a statute on the ground that it may conceivably be applied to other individuals, in other situations not before the court. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States v. Maestas*, 523 F.2d 316 (10th Cir. 1975). Also see *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The court holds that 18 U.S.C. §1696 is not unconstitutional for any of the reasons asserted by

defendants. Accordingly, their motion for judgment of acquital is denied.

The court further holds that the conduct of defendants as disclosed in the stipulation of facts falls squarely within the proscriptions of 18 U.S.C. §1696. The defendants are found and adjudged guilty of the offense charged in the information.

A presentence investigation is ordered to be made. Sentencing is set for July 19, 1976, at 1:30 P.M. Defendants and counsel are directed to be present.

IT IS SO ORDERED.

Dated this 28th day of June, 1976, at Kansas City, Kansas.

/s/ EARL E. O'CONNOR
United States District Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1780

No. 76-1781

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

ROBERT EUGENE BLACK

and

ALTERNATE SYSTEMS, INC.

Defendants-Appellants

Appeal from the United States District Court
for the District of Kansas (D. C. No. 76-48-CR2)

Robert L. Lundblad, Kansas City, Kansas, for Defendants-Appellants

Douglas B. Comer, Assistant United States Attorney, Kansas City, Kansas (E. Edward Johnson, United States Attorney, and Richard L. Hathaway, Assistant United States Attorney, Kansas City, Kansas, on the brief), for the Plaintiff-Appellee.

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges

McWilliams, Circuit Judge

Alternate Systems, Inc. a corporation, and Robert Eugene Black, individually and in his official capacity as the president of Alternate Systems, Inc., were charged with knowingly and unlawfully establishing a private express for the conveyance of letters by regular trips over one or more post routes, in violation of 18 U.S.C. §1696. The express route established was to and from the cities of Pittsburg and Frontenac, in the State of Kansas, towns between which the United States has established regular postal routes. Trial was to the court, sitting without a jury, and was based on a written stipulation of facts. By the stipulation the defendants admitted, in effect, that they were in violation of the provisions of 18 U.P.C. §1696, but reserve for judicial consideration the constitutionality of the statute under which they were prosecuted. The trial court upheld the constitutionality of 18 U.S.C. §1696, and accordingly found both defendants guilty of the crime charged. This appeal followed.

The only issue is the constitutionality of 18 U.S.C. §1696. Article I, Section 8 of the Constitution provides, inter alia, that Congress shall have the power to establish post offices and post roads and to make all laws necessary for carrying into execution that power. Under the so-called "private express statutes" the United States has a monopoly on the handling of letters through the mail. 39 U.S.C. §601, et seq. The pertinent part of 18 U.S.C. §1696, under which the defendants were prosecuted, reads as follows:

> Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city,

> town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

It is conceded that the private express statutes were intended to give the United States a monopoly in the delivery of letters and to preclude competition by private express. Conceding such to be the effect of the private express statutes, it is defendants' basic position here that the statutes are themselves unconstitutional for the reason that such are beyond the power granted Congress by the Constitution. Counsel relies primarily on various writings of Alexander Hamilton and James Madison to support this proposition. Whether such historical expressions have present pertinancy is debatable. In any event, the proposition here argued for by the defendants is at odds with judicial precedent.

In Ex Parte Jackson, 96 U.S. 727 (1877) the Supreme Court spoke as follows:

> The power vested in Congress 'to establish post-offices and post-roads' has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. The validity of legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned . . . Id. at 732.
>
> . . . But we do not think that Congress possesses the power to prevent the transportation in other ways as merchandise, of matter which it excludes from the mails. To give efficiency to its

regulations and prevent rival post systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used when the Constitution was adopted, consisting of letters and of newspapers and pamphlets, when not sent as merchandise; but farther than that its power of prohibition cannot extend. Id. at 735.

Blackham v. Gresham, 16 F. 609 (2d Cir. 1883) is factually similar to the present case. That case involved a private express employing some 50 carriers who collected and delivered letters in New York City. In holding that such an operation violated a predecessor statute to 18 U.S.C. §1696, the Second Circuit observed as follows:

> Not only is the establishing of a private express for the transmission of mail matter within a city where letter-carrier routes have been established an offense within the language of the existing law, but such a scheme so clearly contravenes the policy of the postal law that it would be a matter of surprise if congress had intentionally tolerated such a competition with the business of the government.
>
> As pointed out by the attorney general of the United States in 1859, (9 Op. 161,) 'the business of carrying letters and other mail matter belongs exclusively to the government; and in cities and the large towns letter carriers are as much part of the system as the transportation of the mails from one office to another.' If private agencies can be established, the income of the government may be so reduced that economy might demand a discontinuance of the system; and thus the business

> which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service. Id. at 611.

In Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910) the Eighth Circuit was concerned with a statute which, like 18 U.S.C. §1696, proscribed private express for the conveyance of letters and prescribed a penalty therefore. As concerns the power of Congress to enact such a statute, the Eighth Circuit said:

> While at one time questioned, there remains no doubt but that, under the constitutional authority granted, Congress may, as it has done, reserve to the postal department of the government a monopoly of the business of receiving, transmitting, and delivering the mails of the country, and in the exercise of such right of monopoly Congress may enact such rules, regulations, and laws as will effectively preserve such right of monopoly intact, and as will deter all others, including private individuals and express companies, from engaging therein, and to this end Congress may prescribe such fines, penalties, forfeitures, and punishments as it may deem proper to preserve this right of monopoly retained by the government. For this purpose section 3982 above quoted was enacted. Id. at 356.

Although the constitutionality of 18 U.S.C. §1696 was not at issue in National Association of Letter Car-

riers, AFL-CIO v. Independent Postal System of America, Incorporated, 470 F. 2d 265 (10th Cir. 1972), in that case we did state that the plain intent of 39 U.S.C. §601 and 18 U.S.C. §1696 is that the United States should have a monopoly in the delivery of letters and that the private express statutes were designed to give effect to the Constitutional mandate that Congress establish "Post Offices and Post Roads."

Based on the authority above referred to, we now hold that 18 U.S.C. §1696 is constitutional and represents a valid exercise by Congress of the power granted by Article I, Section 8 of the Constitution.

Judgments affirmed.

AFFIDAVIT OF SERVICE

ROBERT L. LUNDBLAD being first duly sworn deposes and states:

That in accordance with Rule 32(2)(a), Supreme Court Rules, he has served a copy of the following documents on the United States Attorney for the District of Kansas, Kansas City, Kansas, and has forwarded by air mail a copy of the following documents to the Solicitor General, Department of Justice, Washington, D.C. (20530), on this 27th day of February, 1978.

(1) Petition for Writ of Certiorari

(2) Affidavit of Service

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and ROBERT L. LUNDBLAD

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504 Security Bank Building
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Phone: 913-321-5051

Subscribed and Sworn to before me this 27th day of February 1978.

Notary Public